AUSTRALIAN FEDERATION: SOME CONSTITUTIONAL COMPARISONS.

BY JOHN W. RUSSELL.

NEVER have the framers of a constitution profited by so rich an experience as have the Australian statesmen who finished their deliberations at Melbourne a few months ago, and submitted the result to the popular vote of the different colonies. The instrument of government fashioned by their skill and patience ought to be free, one would suppose, from the propositions of the doctrinaire as well as the limitations imposed by the exclusive study of one model. Besides the constitution of the mother country, they had before them the record of the practical working of the American, Canadian and Swiss federal systems, as well as that of the German Empire. In solidity and complexity of structure these systems surpassed all previous examples of federal government, and two of them had special claims upon the attention of Australian legislators, who had little reason to go beyond the constitutions of the United States, Canada and the Swiss Republic for the necessary guidance and instruction. These summed up the best that had been thought and done to federalize democracy, and their historic and structural differences allowed a catholic choice of material.

Far more difficult was the task that confronted the statesmen of the Philadelphia Convention in 1787, or that which engaged the energies of the pioneers of Canadian Confederation. In both cases the territorial area and the diversity of interests were greater than had ever been embraced under a federal government, and in both there were disturbing causes severely trying to the resources of the most experienced judgment. In the former case the experiment was made after the emergence of a group of colonies from a prolonged and sanguinary war of insurrection;

in the latter, it was somewhat hastily resorted to as a refuge from dangers which seemed imminent, and under prejudices which biassed political deliberation. But if the United States and Canada came into federal being under stress, the calm of unforced development has been the lot of Australia. Not a battle has been fought, nor a single shot fired, in the course of progress whose results are so remarkable and rich in promise. The unchecked experimentation of the separate colonies, which almost aspired to test the millennial claims of the new theories of social reconstruction, has been largely replaced by the concept of continental unity and the wider outlook which accompanies it.

It has been said that little originality can be claimed for this latest experiment in constitution building, and that both trend and goal had been unmistakably revealed by expediency as well as by shining political examples. It is hardly necessary to discuss the question of comparative originality in the case of a people who inherit a racial instinct for self-government, and who, if latest in the order of time, may claim an original use of the lessons of experience. The eulogies pronounced upon the Constitution of the United States have been largely inspired by its position of initiative, as a federation under new and untried conditions; the strength and size of the structure bespoke the daring wisdom of the architects. They patterned chiefly from British and colonial models, but they ventured much without the sanction of any precedent. In like manner the Canadian framers had new problems to solve, although to a certain extent they copied the Constitution of the United States. They had to devise a federation within that Empire which their American prototypes had cast off; they had a triple set of political powers to consider, while the convention at Philadelphia had only two. It is hardly necessary to emphasize the incomparable vantage ground from which the Australian statesmen could see where and why their federating predecessors had in some respects been mistaken. Careful in their study of the American and Canadian constitutions, intent and plan were compared with result in the history of their practical working, and the necessary imitations, omissions and variations were made in the Australian system.

The Australian people have not been suddenly enthusiastic in support of federation, although in parliamentary circles the idea has long been familiar. Practical progress thus far has de-

pended upon the necessity of communicating to the people the views and beliefs which had almost become axiomatic with some of their ablest leaders. As far back as 1849 a committee of the Imperial Privy Council, acting in conformity with the best Australian opinion, advised the formation of Victoria into a separate colony, and at the same time favored the creation of a general assembly to legislate on intercolonial subjects. There was strong opposition to any imperial enactment embodying these recommendations, but the movement went on in the discussions of deliberative bodies, formal and informal, and its progress was registered in the reports of select committees and royal commissioners. Public men saw the trend of events, and leavened parliamentary discussion with the desirability and high promise of the coming change. Influences from without quickened the movement that was progressing from within, and in 1883 the perception of French and German designs in the Pacific helped to efface the differences which had weakened the feeling for union. The result was the Federal Council Act, providing for a federal legislature of limited powers, and extending only to such colonies as chose to come under its authority. It was strongly opposed by Sir Henry Parkes, who had at first looked favorably upon the project, and it was felt that the measure was only preparatory.

Major-General Edwards' report for 1889, urging the necessity of federation from a military point of view, made salient the features of a situation which called for a remedy. In New South Wales, Sir Henry Parkes and his friends took advantage of the report to press the claims of federation, and the political leaders of the other colonies were urged to fall in line with the movement. An intercolonial conference held in Melbourne, in 1890, resulted in the Sydney Convention of 1891, composed of delegates elected by the parliaments of the different colonies, and authorized to frame an adequate scheme for a federal constitution. The Commonwealth Bill was the result; but its reception showed comparative apathy on the part of the colonial electorates. There seemed to be no strong popular impulse in favor of it, except in a few places, and no enthusiasm spread from these. The friends of the bill claimed that the great mass of voters had not been taken into the confidence of the parliamentary leaders, and they forthwith set about to remedy the defect. Federation leagues

and other voluntary, unofficial public bodies met in the different colonies to discuss the situation; and it was agreed that if a new convention, with delegates elected by popular suffrage instead of by the parliaments, were held, and efficient legal machinery provided for the whole constitutional process, from the election of delegates up to the transmission of the completed instrument to the imperial authorities for final enactment into law, there would be neither a lack of popular support nor a long delay in attaining the completed result.

These ideas found a voice at the Corowa Convention of 1893, where Dr. Quick procured the passage of resolutions in favor of a federal enabling act to be passed by the parliaments of the different colonies. New South Wales, Victoria, Tasmania, South Australia, and finally Western Australia (though not in favor of delegates elected by the people) passed the act, under whose provisions the final convention has been held. It should be borne in mind that the Commonwealth Bill of 1898 differs somewhat from that drafted by the Sydney Convention of seven years ago, and that the more democratic character of the present measure only reflects the political impulse which determined the popular election of the delegates. Between 1891 and 1897 federation became more truly a popular question, and the different electorates shared, in the revived movement, the initiative which had formerly rested with their leaders in Parliament. Such, in brief outline, is the history of the federation question, and whether the Commonwealth Bill is or is not ratified by the people, it is unlikely that its provisions will be materially changed so long as it is a living issue.*

The new constitution provides for a federation under the British Crown, and composed of the colonies of New South Wales, Victoria, Tasmania, South Australia and Western Australia. The Federal Legislature consists of the Queen, represented by a Governor-General; a Senate, in which each colony, henceforth to be known as a State, is to be equally represented by members directly elected by popular vote; and a House of Representatives whose members will be in proportion to population. There will be a Federal Supreme Court, whose judges will hold office during good behavior. The principle of the division of

* Since the above was written Victoria, Tasmania and South Australia have voted for federation, thus ensuring the establishment of the new constitution, at least so far as the three colonies that supported it are concerned.

legislative power between the federation and the States is the same as that of the American Republic, the States retaining all powers except such as are expressly given to the federation. The House of Representatives has the power of originating money bills, which the Senate may accept or reject, but may not amend. An important safeguard against deadlock between House and Senate has been made by a clause which provides for simultaneous dissolution to be followed, in the event of continued disagreement, by a joint session of both Houses, when a two-thirds majority shall decide the passing of the bill in dispute. Among the subjects exclusively within the scope of federal legislation are commercial relations with other countries and among the several States, customs and excise, posts and telegraphs, military and naval defence, navigation and shipping, banking and the currency, marriage and divorce. The difficult question of the financial relations of the States was referred to a special committee whose report has been largely incorporated in the constitution, which provides that a uniform customs tariff shall be established for the federation within two years. Trade within the borders of this tariff is to be absolutely free, and the just contribution of each State to the federal revenue is to be determined by careful investigation. Constitutional amendments require a majority of the Senate and House of Representatives, after which they must be submitted to conventions elected by the people of the several States, and approved by a majority of such conventions. The people of the States whose conventions so approve must also be a majority of the people of the Commonwealth. An amendment diminishing the proportionate representation of any State in either House of the Federal Legislature shall not become law without the consent of such State.

It is not easy to say whether the American or the Canadian constitution has been more closely copied. If the former has been the chief model in the formal statement of certain principles recognized as federal, the latter has been imitated in the introduction of cabinet or responsible government, thus establishing the rule of British constitutional usage in the exercise of executive power and the conduct of legislation—a principle of growth whose processes and results are unwritten law. That the new nation is not to be an independent republic, but the Commonwealth of Australia under the British Crown, is

doubtless owing to the peaceful political development which was repugnant, from the standpoint of interest as well as of racial affiliation, to a separation from the mother country. The relation of a dependency which is more nominal than real, and which may look forward to a larger and final federation in an equal union, has not been found incompatible with a national life and dignity.

Some of the constitutional features in which the new federation differs from the American and Canadian are of more than ordinary interest. The scope of federal executive power is substantially the same as in the Dominion of Canada, though time may develop some unexpected divergences. In the Australian system the relation between the federal executive and the Governors of the States will be different from that which obtains in the Dominion. In the latter, the executive heads of the different Provinces are appointed by the Governor-General in Council—that is to say, by the federal prime minister of the day. They may at any time be dismissed from office by the same authority for cause assigned, and provincial legislation is likewise subject to a federal veto. But in Australia each State will appoint its Governor, and State legislation will not be subject to either an imperial or a federal veto.

The powers of the Supreme Court are a close approximation to those of the Supreme Court of Canada. It is, of course, designed to be the guardian of the constitution, whose provisions it will interpret. It will also have jurisdiction in cases arising under federal legislation and in inter-State cases, as well as appeals from State courts. It cannot be strictly called, like the Supreme Court of the United States, a tribunal of final resort, because its powers are subject to alteration by parliament, and the right to appeal from its decisions to the Queen in Council further restricts its jurisdiction. The federal legislature may define or custom may establish classes of cases on which its decision may be considered final, so that it may be difficult to obtain leave to appeal therefrom; but there is the constitutional provision, overriding everything to the contrary, that the Queen in Council may in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's dominions are concerned, grant leave to appeal from any judgment of the Supreme Court of Australia. The granting of such leave is dis-

cretionary, and judging by Canadian experience it will prove to be without friction. The suggestive fact is that the Australian States, though relatively of greater importance than the Provinces in the Canadian system, have shown no jealousy of any judicial interpretation of their rights. The thread of connection runs from the State courts up to the throne; contests over questions of greater or less importance may proceed in an ascending series of judicial determinations up to the Privy Council; and by these provisions, which would seem to break in upon the consistency of separate spheres of federal and State sovereignty, and to go beyond them both, the people of Australia have shown their confidence in the integrity of the bench. Apart from the purely legal view, the result cannot but tighten the political bond with the mother country.

The constitution of the Senate is a departure from the usual form of the upper house in the British and colonial parliaments. Like the Senate of the United States, it stands consistently for the federal principle, and the States are therefore equally represented in it. There is no such marked disparity in their populations as that which allows the votes of Nevada and New York to neutralize each other. For the choice of senators by the State legislatures, as established by the Sydney Convention of 1891, direct popular election has been substituted. It is quite evident that the members of the Melbourne Convention made a careful study of the Canadian, American and Swiss senates with special reference to the inconsistencies and defects of the first two. The influential minority of reformers, who have long been satisfied that United States senators should be elected by popular vote, will regard the Australian experiment with deep satisfaction, nor will they fail to attribute the result partly to their own persistent efforts. Between 1891 and 1897 resolutions in favor of this change, involving an amendment of the Constitution, passed the House of Representatives at Washington and were reported favorably in the Senate. Only a few weeks ago the House passed another similar resolution by a practically unanimous vote of 184 to 11. The arguments in the support of these resolutions are well known by forcible repetition. The corrupt methods by which an undue number of rich men have become senators, the tedious and bitter contests in certain cases, the cynical despotism of the "boss," the gerrymandering of senatorial and represent-

ative districts by State legislatures, the narrowing of political issues by the personal interests of senators seeking election—all these abuses have been set forth not without benefit to those who wished to avert similar evils in Australia. Fearing their probable recurrence in the new federation, its framers have in effect declared that an indirect choice of senators is undemocratic; they have recorded their disbelief in a vicarious exercise of the individual franchise; they did not think that the State legislatures could act with a more trained discretion than the people themselves, or rather they held that the people's instinct for the right men could supply the public service better than could party management in a State legislature of variable complexion.

The Canadian Senate, an imitation of the House of Lords so far as unsuitable conditions would allow, was evidently regarded by the Australian statesmen as something to avoid imitating. It was, of course, looked upon as undemocratic both in principle and practice, and the apportionment of members was deemed a plain violation of the federal principle of equal representation. In the Confederation Act the Provinces of Nova Scotia and New Brunswick were counted as one and given an equal representation with Ontario and Quebec; there was a creation of three equal groups, but no equality in the Provinces themselves, as was shown on the subsequent admission of Manitoba and British Columbia.

The undemocratic character of the chamber may be accounted for to some extent by the strong temper and exciting conditions under which the Canadian framers matured their plans. Their deliberations were made exigent by the Civil War, which to them conveyed a lesson of the danger of State rights. Besides, they remembered the unsatisfactory experience with the elective Legislative Council which existed for some years prior to Confederation. Under the circumstances it is not strange that they were disposed to belittle and distrust an upper house patterned after that of the neighboring republic, and although they saw that a federal constitution was inevitable, they put as much of the British leaven in it as they possibly could. The opening words of the preamble to the British North America Act are: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the

United Kingdom." The last clause seems inconsistent, unless very freely interpreted, but if justifiable at all, it is by the provisions relating to the Senate. An irresponsible body, fixed in number and nominated for life by a Governor-General, who is advised by a party leader, is the constitutional anomaly of Canada, and suggests Voltaire's witticism on the Holy Roman Empire. He said it was neither "Holy," nor "Roman," nor "Empire," but not with more truth than any one can say of the Dominion Senate, that it is neither federal, nor representative, nor democratic, although it has many excellent and able men among its members. The hereditary principle is lacking, because the structure of Canadian society put that out of the question; but, on the other hand, it has no fear, like the House of Lords, of a sufficient increase in membership to ensure the passage of a popular measure toward which it may be recalcitrant or reactionary. Only saving common sense and a prudent regard for public opinion can prevent it from the obstruction of public business. By virtue of its constitutional powers it could almost wreck the legislation of a session, if partisanship were strong enough to prompt such a course; but its only Nemesis is a constitutional amendment.

Experience alone will determine whether the Australian upper house will, like that of England and Canada, prove inferior to the lower in the contribution of its members to the interest and dignity of public life. In this respect the Senate of the United States has, in the estimation of some capable critics, of late years descended from its former high estate. The presence of members who have no exceptional ability or real political importance, and the marked deterioration in eloquence and argument as compared with the great days when Webster, Clay and Calhoun made memorable the debate of public questions, have been ascribed, as already intimated, largely to election by the State legislatures, especially in their later phase of control by a rigid party mechanism whose methods, quite removed from the prevision of true statesmanship, are concerned with the art of winning elections and distributing patronage. It is, perhaps, as much owing to this fact as to any other that so many men of character and ability have grown indifferent to the claims of political duty.

To the objection that a Senate directly elected by the people will not be less liable than the House of Representatives to im-

pulsive action, or that it is not likely to have that discernment in legislative revision which is often supposed to distinguish the upper house in bi-cameral parliaments, the Australian statesmen have made answer by providing for the election of one-half of the members every third year. This, according to expert opinion, is calculated to prevent sudden and rash changes, without unduly retarding the passage of any law decisively favored by the people. Two classes of senators, elected at different times, are also less liable to reflect too thoroughly any passing phase of opinion.

The introduction of cabinet or responsible government in the new federation has been made under exceptional conditions. It is the most marked divergence from the system of the United States, and, with some reservations, the most important resemblance to that of the Dominion of Canada. The British House of Commons, in the course of its development as the embodiment of the popular principle, has drawn to itself the practical control of the executive and legislation, and the dependence of the Cabinet upon the majority in the House is the central fact in parliamentary government. But it implies a certain inferiority in the power of the House of Lords, and has been inveterately associated with the non-representative character of the latter. The question arises, how will the Australian cabinet system work when both Houses are directly elected by the people? If even at the present day in Great Britain and Canada responsible government is a principle whose force and direction are not always closely calculable, how much less so may it be when one of its historic elements is changed in this new experiment? Will an Australian ministry rest upon a majority in one House, or in both? The Commonwealth Bill does not specify; it declares in effect that the Governor-General shall be aided and advised by an executive council whose members shall be eligible to seats in either House. The rest is left to unwritten custom.

It seems difficult to reconcile the usual meaning of a "parliamentary session" with the prescribed duration of either House in the new federal legislature. In Great Britain and Canada those words signify the constitutional term of the House of Commons, and the expiry of that term marks the time for dissolution and the possible advent of a new ministry. The Australian House of Representatives is to be elected for three years, and if the custom of the mother country is to govern, popular confidence in the

ministry must be similarly tested by dissolution. The Senate need not be consulted, and either its importance must be lessened thereby or the traditional practice in cabinet government must be greatly modified. It seems improbable that the House of Representatives will consent to share the prerogatives inherited from its great original. It retains the power of the purse by the right to originate money bills, which the Senate cannot amend. The Governor-General can dissolve it; but he has no power to dissolve the Senate, and that is a restriction which is more than likely to have a marked influence in perpetuating cabinet government on customary lines, as it excludes the Senate from that direct appeal to the people which not only arises by effluxion of time, but is contingent on an executive act. It is difficult to see why the resulting verdict should not decide the fate of a ministry, independently of the Senate.

In the case of a party leader of strong personality and tenacious grip on the springs of political power, a few decisive precedents might determine this question. Suppose, for example, that during the opening years of federation there should appear on the scene a statesman equal in capacity to the late Sir John Macdonald, and who should wield in Australian politics a sway as continuous and masterful as that of the late Conservative leader in Dominion affairs. Sir John held the premiership for nineteen years, exclusive of his lease of power before Confederation. His last tenure of office was from 1878 to 1891 without interruption. If the first premier of Australia should be supported by a majority in the House of Representatives for that length of time, an adverse majority in the Senate would have some difficulty in displacing him. He would control legislation in the House during more than four terms, and in default of opposition from the Senate during the first term he could invoke such default in support of the right to hold power so long as he could retain his majority. All the presumptions of cabinet custom would be in his favor; he could dispute the claim of the Senate to a voice in determining the fate of a ministry which owed its existence to the House alone. And he could with consistency allege that the Senate, though elected by the people, did not represent the people as a whole, but only the States, as electoral districts with separate and possibly conflicting interests. If the hereditary principle of the House of Lords, or the nominee power which fills

the Canadian Senate, or the federalism of the Senate of the United States—if each of these is different from the principle which represents the collective will of the whole people expressed at one time, none of them, it might be argued, should be suffered to share that control of the executive which has so long depended upon the popular branch of the legislature.

The question of frequency in changes of the federal ministry is suggested in connection with the unenviable showing in the colonies. New South Wales, Victoria and South Australia had ninety-six different cabinets in forty years. It is inconceivable that efficiency in federal administration could exist with such a kaleidoscopic shuffling as has marred the field of view in provincial politics. But there are reasons why this need not be expected. Political affairs will henceforth demand a broader outlook and compel wider issues. Many of the most contentious subjects of legislation will be left to State control. Ministries will not rise and fall, as they have in the past, on a petty question of accounts or some matter of merely municipal interest. New conditions rule, and it is warrantable to expect a more equable conduct of public administration when the national life shall call for a better trained and more responsible service. When that service is given, it will be moulded by the traditions of British parliamentary government. The "manners, virtue, freedom, power" which have been associated with those traditions in the mother country will not be absent from the political career of her youngest daughter nation.

JOHN W. RUSSELL.